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In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY
OF HEALTH AND HUMAN
SERVICES, ET AL., PETITIONERS

v.

FRANK KUEHNER, ET AL., RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JONATHAN M. STEIN
Counsel of Record
RICHARD WEISHAUPT
JAMES LAFFERTY
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, PA. 19107
(215) 893-5312

35 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the District Court have jurisdiction over a class action by recipients of Social Security disability benefits to enjoin the Secretary, in state and federal eligibility reviews, from continuing to apply evidentiary standards and procedures previously determined to be illegal by the Third Circuit where some class members had not completed the Secretary's administrative process?

2. In making a determination whether jurisdiction exists under 42 U.S.C. §405(g) (Supp. V 1983), and all other jurisdictional requirements are met, must a federal court defer to the determination of the Secretary of Health and Human Services that full exhaustion of administrative remedies should be required, if the Secretary's determination is an integral part of a program of resistance to final federal Court of Appeals interpretations of law, and further exhaustion is objectively futile?

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In the Supreme Court of the United States

October Term, 1983

No. 83-1593

Margaret M. Heckler, Secretary
of Health and Human
Services, et al., Petitioners

v.

Frank Kuehner, et al., Respondents

Brief in Opposition to Petition for a Writ of
Certiorari to the United States Court
of Appeals for the Third Circuit

Respondents oppose the petition of the Solicitor General for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. The opinions below, jurisdiction of this Court, and statutory and regulatory provisions at issue are as stated in the petition.

COUNTERSTATEMENT OF THE CASE

This is a class action filed on April 29, 1982, in the United States District Court for the Eastern District of Pennsylvania, against the Secretary of Health and Human Services (the "Secretary"), the Commissioner of Social Security, and two state officials responsible for administering Social Security disability claims under contract with the Secretary. It involves questions whether the Secretary refuses to follow controlling Third Circuit precedent in disability review proceedings and, if so, whether respondents are entitled to class-wide relief. The sixteen named plaintiffs represent a class consisting of all disability beneficiaries under Title II and Title XVI of the Social Security Act, 42 U.S.C. §§401 et seq., 1381 et seq.,[1] who reside in Pennsylvania and who have presented claims for continuing benefits.[2]

Beginning in March 1981, the named plaintiffs and all class members (except a small number whose disabilities have

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1. Title II of the Social Security Act provides for disability insurance benefits (SSDI) for disabled workers. 42 U.S.C. §401 et seq. SSDI benefits are based upon an individual's earnings records and are paid without regard to financial need. Title XVI of the Social Security Act provides for Supplemental Security Income (SSI) for persons who are both poor and disabled. 42 U.S.C. §1381 et seq. SSI benefits are paid to eligible poor persons whose income and resources fall below a certain level.

2. A motion to alter the class certification to include initial applicants for disability benefits has been filed in the District Court, but has not been acted upon. Four of the original named plaintiffs, including Mr. Royal, see Petn. for Cert. 7 n.3, are no longer actually involved in this case.

been deemed permanent) became subject to two types of mass reviews of their eligibility to receive benefits. First, pursuant to Section 311 of the Social Security Disability Amendments of 1980, 42 U.S.C. §421(h)(1), they became subject to "continuing disability investigations" at least every third year. Second, those named plaintiffs and class members whose disabilities were expected to be of limited duration were scheduled for "medical diaried" reviews on dates by which the Secretary estimated they might no longer be disabled.

The Social Security Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months." 42 U.S.C. §§423(a)(1), 1382(c)(3)(A). The administrative standards and procedures for determining continuing disability under Title II and Title XVI are set forth at 20 C.F.R. §404, subpart P, and §416, subpart I. When a recipient's eligibility for benefits is reviewed, the recipient is contacted by the state agency and told that his or her case is being reviewed to determine whether he or she is still disabled. If the state agency determines that the recipient is no longer disabled, it sends the recipient a letter informing him or her of the determination; the Social Security Administration terminates payments of benefits shortly thereafter. A recipient may request reconsideration from the

state agency, and may seek further review of a termination of benefits from (in turn) an Administrative Law Judge, the Social Security Administration Appeals Council, and the federal courts. (An SSI recipient appeals a termination on medical grounds directly to an ALJ.) See Heckler v. Day, No. 82-1371 (May 22, 1984). Appeal through the federal district court level generally takes at least two years from the date of denial of benefits.

The massive number of continuing disability investigations and medical diaried reviews since 1981 have caused incalculable havoc in the lives of persons previously receiving disability benefits. The "tragic human cost" of the review programs generally, including suicides and terminations of persons whose medical conditions had actually deteriorated, has been documented in Oversight of Social Security Disability Benefits Terminations: Hearings before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 97th Cong., 2d Sess. (1982) ("Oversight Hearings").

Respondents' claims concern four specific aspects of the process by which such reviews are being carried out:

1. Social Security Administration regulations and policy statements expressly countenance findings that beneficiaries are no longer disabled without any finding that or inquiry whether their medical condition has improved since their prior hearings.[3] The Third Circuit and other Courts

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3. See Social Security Ruling, 81-6; 82-10c; Memorandum from Louis B. Hays, Associate Commissioner of Office of Hearings and Appeals (Feb. 29, 1982), App. at A43.

of Appeals have held that, when the Secretary or a federal court has made a previous finding of disability, the Social Security Act and the Due Process Clause of the Constitution require some evidence of improvement before determining that an individual is no longer disabled.[4]

2. Social Security Administration regulations and policy statements fail to afford beneficiaries any presumption that their previously determined disabilities continue to exist. Thus, persons who have received disability benefits for years, or who have been determined to be disabled within the past year, must carry the full burden of presenting evidence that they are presently disabled in administrative review proceedings, as if they were initial applicants for benefits. At least two Circuits have held that the Secretary must carry the burden of going forward in such instances.[5]

3. The Social Security Administration does not accord substantial weight to the reports of the physicians responsible for the ongoing treatment of disabled persons, and it terminates benefits solely on the basis of brief "consultative" examinations by doctors paid by the Social Security Administration or state agencies, without any finding that the reports of such doctors are more complete or reliable than those of the treating physician.[6] The failure to

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4. Daring v. Heckler, 727 F.2d 64, 68-69 (3d Cir. 1984); Kuzmin v. Schweiker, 714 F.2d 1233, 1237 (3d Cir . 1983); Simpson v. Schweiker, 691 F.2d 966, 920 (11th Cir. 1982); Patti v. Schweiker, 669 F.2d 582, 587 (9th Cir. 1982).

5. Patti v. Schweiker, supra; Rivas v. Weinberger, 475 F.2d 255 (5th Cir. 1973).

6. See 20 C.F.R. §§ 404.1526-.1527, 416.926-.926, Social Security Rulings 82-58; cf. Social Security Administration, Office of Hearings and Appeals, Memorandum to Administrative Law Judges (April 29, 1982), reprinted in Social Security Forum 15 (July 1982).

accord substantial weight to treating physician reports directly contravenes case law in the Third Circuit and elsewhere.[7]

4. The Social Security Administration regulations and rulings direct state agencies and federal Administrative Law Judges to ignore the combined effect of several impairments (each of which the Secretary considers "nonsevere") and to ignore the effect of pain and other symptoms in certain cases.[8] The Third Circuit has held that the Secretary must consider the combined effects of impairments.[9] The Third Circuit and other Circuits have held that pain alone may constitute

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7. See Wallace v. Secretary of HHS, 722 F.2d 1150, 1155 (3d Cir. 1983); Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983); Cotter v. Harris, 642 F.2d 700, 707 (3d Cir. 1981); Rossi v Califano, 602 F.2d 55, 56-58 (3d Cir. 1979); Wiggins v. Schweiker, 679 F.2d 1387, 1389-1390 (11th Cir. 1982); Carver v. Harris, 634 F.2d 363 (7th Cir. 1980); Bowman v. Heckler, 706 F.2d 564, 568 (5th Cir. 1983); Miranda v. Secretary of HEW, 514 F.2d 966, 999 (1st Cir. 1975); McLaughlin v. Secretary of HHS, 612 F.2d 701, 705 (2d Cir. 1980).

8. See 20 C.F.R. §§404.1522,-.1529, 416.922,-.929; Social Security Rulings 82-55, 82-58. Petitioner Stern has testified before the Senate Finance Comittee that "SSA no longer considers the combined effect of all impairments of the individual, but rather evaluates each impairment singularly, resulting in many of the multiply disabled being terminated from the disability rolls." Statement of Barry H. Stern before the Senate Finance Committee, August 18, 1982; App. at A50.

9. Burnham v. Schweiker, 682 F.2d 456, 458 (3d Cir. 1982). See also Wiggins v. Schweiker, supra 679 F.2d at 92.

a medical impairment within the meaning of the Social Security Act.[10]

Respondents requested declaratory and injunctive relief against all defendants, restraining them from denying benefits to any class member on the basis of the challenged practices.

As of the date of respondents' amended complaint, all named plaintiffs had been initially reviewed and had either had their benefits terminated or received notice of imminent termination. Only one of the named plaintiffs, Clinton Royal, had exhausted his administrative remedies (his benefits were terminated in June 1980, substantially before any of the other named plaintiffs).[11] No allegation was made that all class members had exhausted their administrative appeals.

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10. Smith v. Schweiker, 671 F.2d 789, 793 (3d Cir. 1982); Taybron v. Harris, 667 F.2d 412, 415 (3d Cir. 1981); Smith v. Harris, 644 F.2d 985, 988 (3d Cir 1981); Layton v. Heckler, 726 F.2d 440, 442 (8th Cir. 1984); Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983); Murray v. Heckler, 722 F.2d 499, 502-503 (9th Cir. 1983); Benson v. Schweiker, 652 F.2d 406, 409 (5th Cir. 1981); Myers v. Califano, 611 F.2d 980, 983 (4th Cir. 1980); Marcus v. Califano, 615 F.2d 23, 27-29 (2d Cir. 1979); Miranda v. Secretary, supra.

    The Eighth Circuit has specifically noted, "For some unexplained reason, the Secretary insists upon ignoring this Court's statements with respect to the proper evaluation of pain." Nelson v. Heckler, supra, 712 F.2d, at 348; cf. Heaney, Why the High Rate of Reversals in Social Security Disability Cases?, 7 Hamline L. Rev. 1 (1984).

11. Since the filing of the amended complaint, all original named plaintiffs have continued to pursue their individual administrative remedies. Eleven have received

[Footnote 11 continued on next page]

A number of the named plaintiffs had received disability benefits without question as to eligibility for over a decade. Others had been found disabled within the previous year and were being terminated based on the same evidence that had resulted in the prior award of benefits. Many members of the class whose benefits were terminated had been awarded full benefits by courts following the Third Circuit authorities that the Secretary refuses to apply.

The District Court dismissed respondents' complaint for lack of subject matter jurisdiction. It held that respondents could not obtain jurisdiction over the federal defendants under the judicial review provisions of the Social Security Act, 42 U.S.C. §§405(g) and 1383(c)(3) (hereafter "§405(g)"), under the general federal question jurisdictional provisions, 28 U.S.C. §1331, or under the mandamus statute, Id. §1361. As to the state defendants, the District Court evaluated respondents' jurisdictional claims only under 28 U.S.C. §1343, holding that jurisdiction could not be founded on that statute because the state defendants had "acted under

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[Footnote 11 continued from previous page]

reinstatement of their benefits at the administrative level; two were denied benefits at the administrative level and appealed unsuccessfully to the District Court, and one of these presently has an appeal pending before the Third Circuit. All named plaintiffs continue to be subject to continuing disability investigations, but see n. 27, infra, or medical diaried reviews, in which the Secretary will apply the illegal standards which are the subject of this case.

color of federal law as mere agents of the Secretary and have not acted under color of any State law," Petn. for Cert. App., at 45a.

The Court of Appeals for the Third Circuit reversed. It held that the District Court had failed to follow (or even to acknowledge) controlling precedent in the Third Circuit as to both §405(g) and the mandamus statute. Liberty Alliance for the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977); Mattern v. Weinberger, 519 F.2d 150 (3d Cir. 1975), vacated and remanded on other grounds sub nom. Mathews v. Mattern, 425 U.S. 987 (1976). Applying these precedents, the Court of Appeals found jurisdiction proper as to the federal defendants under either statute. Petn. for Cert. App., at 7a-12a. The Court of Appeals also held that 28 U.S.C. §1331 provided jurisdiction over the state defendants.

One member of the Court of Appeals, Judge Becker, filed a separate concurring opinion. Pet. for Cert. App., at 14a-34a. He agreed with the majority that jurisdiction over the federal defendants existed under §405(g), but he explained his reasons at greater length, both in light of prior Supreme Court precedent and in light of the Secretary's policy of nonacquiescence in Court of Appeals rulings. Judge Becker wrote:

> "[W]hat really clinches this case for me is the Secretary's posture toward judicial declarations that displease SSA. . . . It thus appears that, when the Secretary has taken a final position on a disputed

> question, he will continue to adhere to, and require compliance with, those views even after a Court of Appeals has resolved the issue against him. Under these circumstances, exhaustion of administrative remedies becomes a mere exercise in futility, both for the claimant and for the court. It makes far more sense to allow the claimants to litigate the case and, if successful, to obtain a decree enforceable via contempt proceedings." Petn. for Cert. App., at 25a-26a.

As to the state defendants, Judge Becker disagreed with the majority that 28 U.S.C. §1331 was an available basis for jurisdiction, but he maintained that jurisdiction over the state defendants was proper under the mandamus statute.

The Secretary filed a petition for certiorari in this Court on March 27, 1984. Respondents received an extenions of time in which to file until June 1, 1984.

ARGUMENT

On May 14, 1984, the Court handed down a full opinion in No. 82-1772, Heckler v. Ringer. That opinion furnishes authoritative guidance on a number of questions of law regarding original federal court jurisdiction over cases concerning the Social Security Act and the relationship of §405(g) of that Act to 28 U.S.C. §§1331 and 1361. The judgment below in this case is fully consistent with Ringer, and to the extent that the Court of Appeals' analysis is inconsistent with that in Ringer, this case will have no precedential effect.

Although similar questions might have been presented by this case, the Court need not repeat the effort it expended in deciding Ringer. None of the issues presented by this case and not addressed by Ringer merit independent review.

1. Ringer decided the important issues in this case.

(a) Prior to the Court's recent decision in Ringer, substantial confusion existed on a number of issues regarding, first, the source of federal court jurisdiction over claims arising under the Social Security Act, and, second, the considerations which would support a waiver of the exhaustion requirement in §405(g) of the Social Security Act for cases in which jurisdiction is founded on that provision.[12]

Ringer provides authoritative guidance on both of these questions. As far as the source of jurisdiction is concerned, it holds clearly that, for Medicare claims, §405(g) of the Social Security Act (as incorporated by §1395ff of the Medicare Act) is the exclusive basis for original federal court jurisdiction over any claim that can be said to "arise under" the Medicare Act. Ringer, slip op. 9-12. By implication, that holding extends to the Social Security program itself, and §405(g)--in the case of Title XVI claims, as incorporated by

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12. See, e.g., National Association of Home Health Agencies v. Schweiker, 690 F.2d 932, 936-942 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 1193 (1983) (and cases cited therein) (discussing splits among circuits).

§1383(e)--must be regarded as the basis of original federal court jurisdiction over claims against the Secretary "arising under" the Social Security Act. The Court of Appeals in this case addressed this precise question and unanimously reached the conclusion now dictated by Ringer. Petn. for Cert. App. 7a-9a; id., at 16a-18a (Becker, J., concurring).[13]

Ringer also clarifies the conditions under which a court may take jurisdiction of a case based on §405(g) despite the plaintiffs' failure to exhaust the full range of administrative remedies made available by the Social Security Administration. As developed in Weinberger v. Salfi, 422 U.S. 749, 763-764 (1975), and in Mathews v. Eldridge, 424 U.S. 319, 328 (1976), §405(g)'s exhaustion requirement is not "purely 'jurisdictional' in the sense that it cannot be waived." 424

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13. Respondents also maintain that, even after Ringer, jurisdiction in this case could be maintained under 28 U.S.C. §1331. Unlike the claims in Ringer, respondents' claims based on the Constitution are not "inextricably intertwined" with their claims for benefits, and they do not seek a remedy that precludes the Secretary from denying their benefits. See Ringer, slip op., at 10-11. Many of the cases on which respondents rely, see nn. 3-10 supra, are interpretations of the Due Process Clause rather than the Social Security Act; in addition, respondents have claims under the separation of powers doctrine, see n. 25, infra. It is not at all clear that respondents' claims "arise under" the Social Security Act rather than the Constitution, or that Congress should be deemed to have denied (in §405(h)) the federal courts jurisdiction over a class of constitutional claims related to the Social Security Act for which §405(g) does not provide a meaningful alternative remedy. See Bush v. Lucas, 103 S.Ct. 2404, 2411-2412 (1983); Leedom v. Kyne, 358 U.S. 184, 190 (1958).

U.S., at 328.[14] Rather, the exhaustion requirement can be waived, either by the Secretary herself when "no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond [her] power to confer," id. at 330, as in Salfi and Heckler v. Day, supra or, with proper deference to the Secretary's position, by the Court itself, as in Eldridge, id., at 330-332. Both Eldridge and Ringer emphasize the practical nature of a court's decision whether to waive the exhaustion requirement over the Secretary's objection, which must be based on "the nature of the claims being asserted and the consequences of deferment of judicial review." Id., at 331 n.11.

The Eldridge Court based its waiver of the exhaustion requirement on its determinations that the claim presented by the plaintiff in that case was "entirely collateral to a substantive claim of entitlement" and that he had raised "at least a colorable claim" that in the absence of interim judicial relief he would suffer irreparable injury. Ringer reaffirms the adequacy of those criteria for judicial waiver,

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14. The non-waivable jurisdictional element of § 405(g) is presentment of a claim for beneifts to the Secretary. Salfi, supra, 422 U.S., at 764; Eldridge, supra, 424 U.S., at 328. Insofar as the "presentment" requirement is concerned, the named respondents are in the same position as the respondent in Eldridge, and the District Court's class certification order incorporates the presentment requirement, see p. 2, supra. See also Ellison v. Califano, 546 F.2d 1162, 1164 (5th Cir. 1977); Wilson v. Edelman, 542 F.2d 1260, 1270-71 (7th Cir. 1976).

slip op., at 14-15, but it also addresses a third factor, futility, id., at 1516.[15] In Ringer, "the exhaustion of administrative remedies [was] in no sense futile" for the plaintiffs, id., at 16, and therefore the Court refused to affirm a judicial waiver based exclusively on futility considerations. Yet Ringer's discussion of futility confirms what had been implicit in Salfi and Eldridge, and what had been the consistent position of the Courts of Appeals after Eldridge, that, with proper deference to the Secretary, a court may impose a judicial waiver on futility grounds.[16]

The analysis in Ringer is consistent with the existing case law in the Third Circuit, as represented by the decision below and by Liberty Alliance for the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977). As is especially evident in Judge Becker's careful concurring opinion, see Petn. for Cert. App., at 21a-27a, the decision below represents a straightforward application of the three-factor anlaysis developed in Eldridge

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15. The traditional consideration of the futility of preserving additional remedies is not expressly addressed in Eldridge, but it is implicit in the Eldridge analysis. See 424 U.S., at 330 ("It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.") The "collateral" claims element of the Eldridge analysis forms a subset of general futility considerations. The more "collateral" a claim, the less likely the Secretary is to consider it on its merits in the context of an administrative system designed for other purposes.

16. See, e.g., Liberty Alliance for the Blind, supra; Smith v. Schweiker, 709 F.2d 777, 780 (2d Cir. 1983); Jones v. Califano, 576 F.2d 12, 17-19 (2d Cir. 1978); De Lao v. Califano, 560 F.2d 1384, 1388 (9th Cir. 1977).

and Ringer with respect to the decision to waive the exhaustion requirement.

A comparison between this case and Ringer is instructive. First, the plaintiffs in Ringer in essence sought a declaration that a specific (and expensive) surgical procedure, designed not to effect a permanent cure but merely to relieve symptoms, was "reasonable and necessary" within the meaning of the Medicare Act. Far from being "collateral" to a basic claim for benefits under the Medicare Act, the relief requested went to the heart of a substantive, policy-laden determination committed by law to the discretion of the Secretary. In contrast, the plaintiffs in this case seek declaratory and injunctive relief solely as to the adjudicative methods used to determine whether they continue to be medically disabled within the meaning of the Social Security Act. Their principal claims concern four specific evidentiary standards promulgated by the Secretary that have, in cases involving individual claims, been found contrary to law by the Court of Appeals for the Third Circuit and by other federal courts of appeals.[17] These judicial interpretations--which have not been appealed by the Secretary to this Court[18]--constitute authoritative determinations that application of such standards

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17. See notes 3-10 supra and accompanying text. In contrast, the issues in Ringer had never been authoritatively adjudicated by the federal courts.

18. In his opinion granting a stay in Heckler v. Lopez, 104 S.Ct. 10, 12 (1983), Justice Rehnquist (sitting as Circuit Justice) noted that it was unlikely that the Court would grant certiorari on these and related issues.

is not appropriately within the discretion of the Secretary, and that the standards are contrary to the statutes and Constitution of the United States. These evidentiary standards are essentially collateral to the basic determination of medical disability that the Social Security Act entrusts to the Secretary,[19] and, although deference should ordinarily be accorded the procedures promulgated by the Secretary, see Heckler v. Campbell, 103 S.Ct. 1952, 1957 (1983), that deference should end with a final judicial determination that the procedures are contrary to law.

With regard to the irreparable injury consideration, the plaintiffs in Ringer had received the benefit of the surgical procedure at issue, and the claims which they sought to bring in federal court concerned compensability only.[20] Clearly, they could not establish even a "colorable" claim that

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19. The Secretary cites Smith v. Schweiker, 709 F.2d 777, 780-781 (2d Cir. 1983), for the proposition that respondents' claims are not collateral to their substantive claims for benefits. See Petn. for Cert. 16. In Smith, the Second Circuit held that a "mechanical improvement" claim similar to respondents' was not "collateral" to the plaintiffs' claims for benefits. Smith does not address claims similar to the other claims raised by respondents, nor does the incidental conflict between the opinion below and Smith change the fact that both the Second and Third Circuits follow the basic analysis in Liberty Alliance for the Blind, supra. See Jones v. Califano, 576 F.2d 12, 19 & n. 11 (2d Cir. 1978).

20. One of the named plaintiffs in Ringer, Freeman Ringer himself, had not had the benefits of the surgical procedure at issue. The Court, however, treated his claim separately and found that jurisdiction was barred on the basis of his failure to satisfy the non-waivable "presentment" requirement. Slip op., at 21; see n. 14, supra.

they would suffer irreparable injury from being required to exhaust their administrative remedies. By contrast, the plaintiffs in this case, many of whom suffer severe psychiatric disabilities, face continuing, non-monetary injury when they are subjected to unlawful disability review procedures. Although current regulations permit disability recipients to continue to receive benefits (subject to recoupment by the Secretary) pending final administrative disposition of their cases,[21] and although many recipients undoubtedly are found to remain disabled in the review process, even under unlawful procedures, the concrete threat of unfair termination and deprivation of benefits causes stress and, in many cases, deterioration of existing medical conditions.[22] Many Title

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21. Title XVI beneficiaries do not lose their disability benefits until after disposition of their administrative appeal by a federal Administrative Law Judge. 20 C.F.R. §416.1336(b). For Title II claims, Congress has enacted temporary legislation permitting persons whose benefits are terminated at the state level to receive interim benefits pending appeal to a federal Administrative Law Judge, subject to recoupment if the termination of benefits is affirmed. The authorization to pay interim benefits expires in June 1984, and it applies only to persons whose claims arose or were pending an administrative review on or after January 12, 1983, and before December 7, 1983. Pub. L. No. 97-455, §2, 96 Stat. 2498 (1982); Pub. L. No. 98-118, §2, 97 Stat. 803 (1983).

22. The interim harm caused by the mass review proceedings is documented extensively in several sets of congressional reports. See generally Oversight Hearings, supra; Impact of the Accelerated Review Process on Cessations and Denials in the Social Security Disability Insurance Program: Report by the Chairman of the House Select Committee on Aging, 97th Cong., 2d Sess. (Comm. Print October 1982); 128 Cong. Rec. S7448-S7449 (daily ed. June 24, 1982) (statement of Sen. Cohen). In addition, several of the named respondents are disabled by severe psychiatric conditions which have deteriorated under the stress of responding to fundamentally unfair review procedures.

II beneficiaries may not be eligible for free legal representation and are forced to retain private counsel to pursue their claims, usually for a contingent fee of up to 25% of the retroactive benefits intended to make them whole. The "colorable" claim of irreparable injury in Eldridge was functionally identical to that of the plaintiffs in this case, see 424 U.S., at 331, and the Courts of Appeals have repeatedly held that similar claims met the Eldridge requirement.[23]

As in Ringer (although to different effect), the futility consideration is paramount in this case. In Ringer, the Court found that, far from being futile, resort to the administrative process would most likely provide the plaintiffs precisely the relief they sought. Slip op., at 15-16. That is far from true for the plaintiffs in this case. As emphasized by Judge Becker, the Secretary "has taken a fixed and final position on the claims at issue" in this case. Petn. for Cert. App., at 24a. As in Eldridge, it would be "unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient." 424 U.S., at 330. Furthermore, the Social Security Administration review system is designed to focus on questions of substantive entitlement to benefits. Precisely because respondents' claims are collateral to the question whether any of them is in fact disabled means that

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23. See, e.g., Jones v. Califano, supra, 576 F.2d at 20-21; Wilson v. Edelman, 542 F.2d 1260, 1270-71 (7th Cir. 1976).

they do not have an opportunity to raise such claims within the administrative review system. It would be enormously wasteful for thousands of administrative law judges and the Appeals Council to consider the legality of the Secretary's system in each of thousands of individual cases. Their basic focus and expertise is, as it should be, with accurate determination of difficult fact questions such as individuals' health, disability, ability to perform their past work, or residual functional capacity. Full exhaustion of respondents' administrative remedies would be objectively futile insofar as their procedural claims are concerned, even though any number of them might ultimately prevail in defending their right to benefits (albeit at considerable human cost).

(b) As Eldridge emphasizes, federal courts should ordinarily defer to the Secretary, who is responsible for the overall efficiency of the Social Security system, in determining whether exhaustion of administrative remedies would be so meaningless as to justify a waiver of the requirement in §405(g). See 424 U.S., at 330. The Court of Appeals in this case recognized its duty to defer to the Secretary. See Petn. for Cert. App., at 25a-26a (Becker, J., concurring). However, the Secretary's unprecedented program of "nonacquiescence" in the Court of Appeals rulings which form the basis for respondents' claims makes deference inappropriate in this

case.[24] The Secretary may not agree with such rulings but they are, at present, the law. The Secretary may have concluded that few of the thousands of disability benefits recipients to whom the illegal procedures are applied will have the "security, awareness, tenacity, and ability" to prosecute an appeal, see Goldberg v. Kelly, 397 U.S. 254, 269 n.16 (1970), and that therefore nonacquiescence will serve her budgetary or political purposes. The courts need not, however, defer to such cynical--and probably unconstitutional[25]--calculations. "The doctrine of separation of powers was adopted by the Convention of 1789, not to promote efficiency, but to preclude the exercise of arbitrary power." Meyer v. United States, 272 U.S. 52, 93 (1926) (Brandeis, J., dissenting).

Furthermore, the Secretary's course of action has substantial detrimental effects on the federal courts themselves. As long as the Secretary enforces illegally stringent review procedures throughout the administrative

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24. On the Secretary's nonacquiescence policies, see H.R. Rep. No. 98-25, 98th Cong., 1st Sess. (1983); Oversight Hearings, supra; Pear, "U.S. Flouts Courts in Determination of Benefit Claims," N.Y. Times, May 13, 1984, at 1.

25. Respondents believe that the Secretary's nonacquiescence policy is unconstitutuional, both as a violation of separation of powers and her art. II, §3 duty to take care that the laws be faithfully executed, see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); United States v. Nixon, 418 U.S. 683, 704- 708 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, (1952), and of the Due Process Clause of the Fifth Amendment, see Bell v. Burson, 402 U.S. 535, 541-542 (1971).

system, and relief from those procedures is available only by subsequent application to a federal court, the federal judicial system will face a flood of petitions for review of Social Security Administration determinations. Furthermore, since district courts in the Third Circuit follow Third Circuit precedents that the Secretary refuses to apply, recipients often find themselves caught in an endless "loop" of terminations, judicial reinstatements, new eligibility reviews, and terminations. Many persons whose benefits are terminated will not bring federal court actions, but many--perhaps thousands in each district--do. In effect, the Secretary has served her own budgetary needs by shifting part of the cost of the Social Security system to the federal judicial system. The federal courts need not assist her in this project. From the standpoint of the federal judicial system, judicial waiver of the exhaustion requirement in this case is necessary to avoid the burden of a substantial increase in the level of disability cases.[26]

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26. The Third Circuit recently began an opinion by stating, "[T]his is the fifth time since the beginning of the year that we have had to remand because of violation of Cotter [v. Harris, supra]." Wier v. Heckler, No. 83-5433 (May 14, 1984), slip op., at 3. The court then examined national statistics regarding disability cases, which showed a 400% increase in district court filings since the institution of the policies at issue in this case. See id., at 4; 1983

[Footnote 26 continued on next page]

(c) For the foregoing reasons, the judgment below is a faithful application of the analysis established by Eldridge and clarified by Ringer. The Court of Appeals' determination that jurisdiction exists in this case, as opposed to Ringer, rests entirely on considerations which are not themselves worthy of Supreme Court review. The only aspect of this case which is not adequately elaborated by Eldridge and Ringer is the effect of the Secretary's nonacquiescence policy on the deference due to the Secretary's determinations with regard to the futility consideration. For the Court to grant review of this case on that basis would enmesh it in a transitory political dispute and would allow the Secretary to derive an unseemly advantage from her policy. Furthermore, respondents

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[Footnote 26 continued from previous page]

Annual Report of the Director of the Administrative Office of the United States Courts 140. The court observed,

> The problem is not so much the increase in filings and the consequent burden imposed on already-taxed federal judicial resources. Rather, what troubles us more is the fact that the Secretary so often appears to have wrongfully withheld benefits or to have processed a claim so that it is impossible to tell whether he correctly denied benefits. In the Eastern District of Pennsylvania, for example, over the past two and one quarter years, the Secretary has prevailed at the district court level only 31 percent of the time. This figure is extraordinarily low, not only because there is no other genre of cases with which we are familiar that is reversed or remanded by the federal courts at such a rate, but also because the Secretary does not even have to show that she is "right" but only that there is "substantial evidence" to support her position.

Wier v. Heckler, supra, slip op. at 4-5 (footnotes omitted).

note that the Secretary's nonacquiescence policy appears to be in flux, and congressional action may well be forthcoming.[27] Given the likelihood of further administrative or legislative changes in the policies at issue in this case before the Court could hear the case and reach a final decision, it would seem unwise to grant review to resolve the issues posed by the nonacquiescence policy.

2. None of the other issues raised by the Secretary merits review.

In addition to the central issues involving the Ringer-Eldridge-Salfi interpretation of §405(g)-(h), the Secretary's petition raises three additional issues, none of which independently merits Supreme Court review.

(a) The Secretary invokes Bob Jones University v. United States, 103 S.Ct. 2017 (1983), and Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378-379 (1982), in arguing that Congress should be deemed to have ratified the Secretary's position with regard to §405(g). The "ratification by silence" doctrine by no means supports the

27. On April 13, 1984, the Secretary announced a limited moratorium on continued disability investigation reviews in anticipation of forthcoming legislation. See Washington Weekly, April 13, 1984, at 57. See also 130 Cong. Rec. S4475-76 (daily ed. April 12, 1984)(colloquy among Senators Dole, Long and Cohen) (describing agreement to report new Social Security disability legislation out of the Senate Finance Committee).

Secretary's position. This case exhibits nothing approaching the clear pattern of rejections of specific, directly relevant bills present in Bob Jones. Furthermore, during the legislative revisions of the Social Security Act in recent years, Court of Appeals decisions such as Liberty Alliance for the Blind, supra, and Jones v. Califano, 576 F.2d 12, 19-21 (2d Cir. 1978), furnished the prevailing interpretation of §405(g) for cases such as this, in which the Secretary has taken a final position on procedural issues affecting disabilty reviews. It is likely that Congress intended to leave in place that interpretation of §405(g). See Bob Jones University, 103 S.Ct., at 2032-2034. In any event, the dispute over this point did not merit the Court's attention in Ringer, to which it was as relevant as in this case, and does not require further refinement of the Ringer analysis now.

(b) The Secretary questions whether the Court of Appeals was correct in finding jurisdiction under 28 U.S.C. §1331 over state officials who make initial disability decisions pursuant to federal standards. Respondents have included the state defendants in this case only for the purpose of obtaining complete relief at all levels of the administrative process. The claims against the state officials relate solely to their administration of unlawful standards at the Secretary's behest. Respondents do not assert that they could maintain a separate action against the state defendants independent of their claims against the federal defendants, and

the Court of Appeals so qualified its holding. Petn. for Cert. App., at 7a.

In his concurring opinion below, Judge Becker disagreed with the majority's conclusion that jurisdiction over the state defendants could be founded on §1331, but he determined that the mandamus statute, 28 U.S.C. §1361, furnished an adequate basis for such jurisdiction. Regardless of the merits of the majority's position on §1331, §1361 provides jurisdiction over the state defendants in this case. In administering a federal program, under federal standards and subject to federal control, they are in the position of an "agency" of the United States for purposes of mandamus.[28] In Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981), on which the Secretary relies, Judge Friendly accepted this position for cases in which the claims against federal and state officials are identical. Id., at 76 n.9; see id., at 78-82 (and cases cited therein) (holding that §405(h) does not bar mandamus jurisdiction).[29] If, as respondents maintain, both federal

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28. The District Court found that the state defendants are the agents of the Federal government for purposes of the making initial disability determinations, Petn. for Cert. App., at 45a, and the Secretary repeats the characterization in her petition, Petn. for Cert. 18. See Chaudoin v. Atkinson, 494 F. 2d 1323 (3d Cir. 1974) (state official subject to mandamus in administering federal program).

29. This Court has repeatedly reserved decision on the availability of mandamus in cases such as this. See Heckler v. Ringer, supra, slip op. at 12-13; Califano v. Yamasaki, 442 U.S. 682, 698 (1979); Mathews v. Eldridge, supra, 424 U.S., at 332 n. 12.

and state defendants continue to administer disability reviews in a manner contrary to controlling federal court decisions, and respondents should be excused from the exhaustion requirement of §405(g) under Ringer,[30] then the mandamus statute provides jurisdiction over the state defendants.

(c) The Secretary attacks the Court of Appeals' statement that, for purposes of reviewing a dismissal for want of jurisdiction, it would accept as true respondents' allegations that the Secretary had taken a final position on the procedural standards at issue in this case. See Petn. for Cert. 17; Petn. for Cert. App., at 9a. The Secretary's standards are all plainly set forth in regulations and formal rulings issued by her and disseminated by the Social Security Administration, and their existence and content are not subject to dispute. Thus, the Secretary's fears of further complicated factfinding at the District Court level are unfounded. The doctrine of judicial waiver set forth in Ringer and Eldridge necessarily implies that the District Court will potentially face questions of fact regarding the extent of exhaustion, possible futility, and the relationship of plaintiffs' claims to their underlying claims for benefits. Presumably such

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30. Ringer holds that exhaustion of remedies requirements apply to the federal mandamus statute. Slip op., at 13. The availability of mandamus jurisdiction in this case thus turns on the same considerations relating to exhaustion under §405(g) discussed above; no separate issues worthy of review are presented.

questions will be resolved the way all preliminary questions of jurisdictional fact are resolved.

3. The procedural posture of this case makes effective Supreme Court review difficult.

The District Court entered its original order dismissing respondents' complaint as well as its order certifying respondents' class without argument on the record, any substantial refinement on the record of respondents' claims, or any exploration of the need to define subclasses of plaintiffs with respect to certain claims. The Court of Appeals rendered a similarly broad-stroked decision--in essence, it reversed the District Court on the critical §405(g) issue for abuse of discretion in failing to take account of controlling Third Circuit precedent. No relief has been granted to respondents. As a result, the case as it appears before this Court is almost purely a matter of initial pleadings, and neither lower court has devoted any attention to the basic issues of who may be entitled to exactly what kind of relief. By way of comparison, see the opinion of the Ninth Circuit denying a stay in Lopez v. Heckler, 725 F.2d 1489 (9th Cir. 1984), in which such issues were addressed on an appropriate record.

If the Supreme Court grants review at this stage of the case, it may well be required, without any factual record, to hypothesize refinements of the generalized allegations and

requests for relief in respondents' complaint in order to determine whether any part of the complaint states a cause of action over which a federal court may take jurisdiction. See, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust, 51 U.S.L.W. 4945 (1983). District courts, rather than this Court or the Courts of Appeals, are the appropriate forum for the basic development of a case. Although jurisdictional decisions are generally made without extensive fact finding at the District Court level, a higher level of factual development in cases such as this may be required for meaningful Supreme Court review. Furthermore, the relief actually granted by a District Court, if any is in fact granted, may illuminate difficult jurisdictional issues at the Supreme Court level.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jonathan M. Stein
Richard Weishaupt
James Lafferty

May 31, 1984